

1 CATHERINE CORTEZ MASTO
 Attorney General
 2 BRYAN L. STOCKTON
 Senior Deputy Attorney General
 3 Nevada Bar No. 4764
 Division of Government and
 4 Natural Resources
 100 N. Carson Street
 5 Carson City, NV 89703
 Ph: (775) 684-1228
 6 Fax: (775) 684-1103
 7 *Attorneys for Nevada State Engineer*

8 **UNITED STATES DISTRICT COURT**
 9 **FOR THE DISTRICT OF NEVADA**

10 UNITED STATES OF AMERICA,)	Case No. 3:73:CV-00125-RCJ-WGC
)	(In Equity)
11 Plaintiff,)	
)	
12 WALKER RIVER PAIUTE TRIBE,)	
)	
13 Plaintiff-Intervenor,)	
)	
14 vs.)	NEVADA STATE ENGINEER'S
)	NOTICE OF PETITION
15 WALKER RIVER IRRIGATION DISTRICT,)	FOR INSTRUCTION
16 a corporation, et al.,)	
)	
17 Defendants.)	
)	
18 In the Matter of Change Application 80700)	
19 filed by The National Fish and Wildlife)	
20 Foundation.)	

21 COMES NOW, the Nevada State Engineer, by and through his attorneys of
 22 record, Catherine Cortez Masto, Attorney General, and Bryan L. Stockton, Senior
 23 Deputy Attorney General, and pursuant to this *Notice of Petition for Instruction*, requests
 24 the Walker River Decree Court interpret and instruct the State Engineer regarding the
 25 role of the United States Board of Water Commissioners (Board) in a proceeding on a
 26 change application before the Nevada State Engineer. The *Petition* is based upon the
 27 following Memorandum of Points and Authorities, the attached exhibits, and all other
 28 papers and pleadings on file herein.

Office of the Attorney General
 100 N. Carson Street
 Carson City, Nevada 89701

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Nevada State Engineer petitions the Decree Court herein to clarify whether
4 the United States Board of Water Examiners may participate in a protest hearing on a
5 change application before the Nevada State Engineer as a party by presenting evidence
6 and witnesses; or, whether the Board must remain a neutral body which is limited solely
7 to providing written comment on a change application.¹

8 **II. STATEMENT OF FACTS**

9 On May 24, 2011, the National Fish and Wildlife Foundation (NFWF) filed change
10 Application 80700 with the Nevada State Engineer requesting to change the place and
11 manner of use of water previously decreed for irrigation to a manner of use for instream
12 wildlife purposes in the Walker River and at Walker Lake. Exhibit 1. Numerous protests
13 were filed in response to the Application.

14 As well, pursuant to Article V, Section 5.4 of the *Administrative Rules and*
15 *Regulations Regarding Change in Point of Diversion, Manner of Use or Place of Use of*
16 *Water of the Walker River and its Tributaries and Regarding Compliance with California*
17 *Fish and Game Code § 5937 and Other Provisions of California Law as amended*
18 *through June 3, 1996* (Amended Rules), on July 15, 2011, the Board provided
19 comments and recommendations within 60 days of receipt of a copy of Amended
20 Change Application 80700. Exhibit 2; *and see generally* Amended Rules, Docket No.
21 1029 (this case). The comments of the Board addressed the following issues and made
22 certain assertions, to wit:

- 23 1. The application should be limited to the consumptive
24 use rather than the full duty applied for under the application;
25 2. The change will conflict with existing rights, affect
rotation and efficiency of certain ditches;

26 ¹ As detailed herein, the Board itself sought clarification on this issue from the
27 State Engineer and consented to the State Engineer's seeking clarification on this issue
28 from the District Court. Exhibit 4, at 4:5-8. In addition, the Walker River Paiute Tribe
concurred in the District Court's speaking to this issue based upon the Court's prior
orders. Exhibit 6, 1:18-20.

Office of the Attorney General
100 N. Carson Street
Carson City, Nevada 89701

- 1 3. The Applicant has not demonstrated it can put the
- 2 water to beneficial use; therefore, it should not be able to call
- 3 for the water;
- 4 4. The manner of use and place of use described in the
- 5 application are overly broad;
- 6 5. Granting the change application affects the
- 7 administration of the Decree;
- 8 6. The application seeks to change more than one water
- 9 right;
- 10 7. There are discrepancies in legal descriptions of the
- 11 rights sought to be changed;
- 12 8. The Board reserves the right to address issues
- 13 related to the storage rights associated with the rights sought
- 14 to be changed;
- 15 9. There will be impact to the aquifer in the West
- 16 Highlands Ditch area;
- 17 10. The broad manner of use and place of use appear to
- 18 be inconsistent with the stated purpose of the various federal
- 19 laws providing for the acquisition of water for Walker Lake;
- 20 11. The water cannot be used at Walker Lake as it is
- 21 outside of the basin of the Walker River;
- 22 12. It is not clear if the assessment to National Fish and
- 23 Wildlife Foundation will remain the same;
- 24 13. Perhaps action on the application should be
- 25 postponed due to pending litigation; and
- 26 14. Raises the question of whether a person can hold a
- 27 water right who does not own any land upon which the water
- 28 can be used.

15 *Id.* During the course of several pre-hearing conferences, other parties to the
 16 proceeding raised the issue of the role of the Board in the pending hearing. On July 17,
 17 2012, the State Engineer entered an Interim Order and Notice of Hearing, but did not
 18 include the Board in the schedule of parties who will be presenting a case or assign
 19 exhibit numbers to the Board. Exhibit 3. Instead, only the Applicant and various
 20 protestants were assigned exhibit numbers and a time for presenting their cases during
 21 the hearing.² *Id.*

22 On August 10, 2012, the Board filed a Motion for Clarification as to its role in the
 23 upcoming hearing, indicating that it believed it had the right to present a full case during
 24 the course of the administrative hearing. Exhibit 4. In response, the Applicant, NFWF,
 25

26 ² Notwithstanding that the Board was not assigned exhibit numbers and a time to
 27 present a case-in-chief, the State Engineer intended to allow the Board to cross-
 28 examine any witnesses presented by either party. Further, since the State Engineer
 does not interpret the role of the Board as a protestant *infra*, he believed the Board
 would not be presenting a case-in-chief.

Office of the Attorney General
100 N. Carson Street
Carson City, Nevada 89701

1 indicated that it has no objection to the State Engineer allowing the Board to participate
2 as a full party to the administrative hearing, but also asserted that the Board should not
3 be taking an adversarial role, as opposed to an informative role in the administrative
4 proceeding. Exhibit 5. NFWF also indicated that it intended to fully explore the matter
5 with the Decree Court; however, NFWF apparently intends to wait until after the State
6 Engineer's administrative hearing on the protested application to seek clarification on
7 this issue. Exhibit 5, pp. 1-2.

8 The Walker River Paiute Tribe of Indians (Tribe) in response to the Board's
9 Motion for Clarification argued that the Decree Court has already held that the Board's
10 function is ministerial, as well as a quasi-judicial, and that the Board should be acting in
11 an impartial, unbiased manner, but is acting instead in an adversarial manner. See
12 Exhibit 6.

13 **III. ARGUMENT**

14 **A. The Decree Court Should Clarify the Role of the Board as a "Party"**
15 **to the State Engineer's Administrative Hearing.**

16 A court is always empowered to "make clear the meaning of a prior decree where
17 necessary to guide the conduct of the parties." See *MacDonald v. MacDonald*, 582
18 A.2d 976, 977 (1990) (additional citation omitted). The State Engineer concurs with the
19 Board and the Tribe that clarification of the Board's role at the hearing pursuant to the
20 Amended Rules should be clarified prior to the hearing, not after, as NFWF suggests.

21 Section 5.4 of the Amended Rules provide that the Board "may participate as a
22 party in all proceedings concerning a change application before an agency" and that
23 within 60 days after the Board receives a change application it "shall provide the agency
24 with comments and recommendations concerning the change application." Docket No.
25 1029 at p. 11. The Amended Rules define a party to mean "any person who appears or
26 is allowed to appear in an agency proceeding or in a proceeding for approval or judicial
27 review of an agency decision or report." Docket No. 1029, p. 4.

28 ///

1 However, § 5.1 of the Amended Rules provide that “[e]xcept as otherwise
2 expressly provided by these Rules and Regulations all proceedings before an agency
3 with respect to change applications and compliance applications shall be in accordance
4 with the practice and procedure of that agency.” *Id.* at p. 10. A protest to a change
5 application may be filed in accordance with the provisions of NRS § 533.365. To that
6 end, Nevada Administrative Code § 533.050 provides that a party means an applicant,
7 or a protestant, and the Board is neither the applicant nor a protestant.

8 It is unclear to the State Engineer what role the Decree Court’s Amended Rules
9 allow the Board to take a “party” in the pending hearing. The rules of practice and
10 procedure for a hearing before the Nevada State Engineer found in Nevada
11 Administrative Code Chapter 533 define a party as either an applicant or a protestant.
12 See NAC § 533.050. As stated above, the Board is not the applicant, which could only
13 leave the Board to appear as a protestant, which be in conflict with this Court’s prior
14 statement that the “court-appointed Board of Water Commissioners acts as a special
15 master in the Walker River Action, . . . and is obligated to conduct itself in an impartial,
16 unbiased manner.” *U.S. v. Walker River Irrigation District, In Equity No. C-125*, Order p.
17 4. (February 13, 1990). Exhibit 7.

18 Accordingly, this Court should clarify whether it intended to alter the regular
19 practice and procedure of the State Engineer to allow the Board to participate as a party
20 pursuant to the Amended Rules, when that right does not exist pursuant to NAC
21 § 533.050. Further, if the Court’s intention was to allow the Board to participate as a
22 party, that the Court further clarify the parameters of the Board’s participation, *e.g.*,
23 limited to cross-examination, presentation of a full-case, and/or taking a neutral or
24 adversarial role at the hearing.

25 **IV. CONCLUSION**

26 The State Engineer hereby requests the Decree Court to clarify its Rules
27 regarding the role of the Board as a party in an administrative hearing before the
28 Nevada State Engineer on a protested water right application.

1 Further, due to the deadline set by the Decree Court for acting on the application
2 and because this matter is set for hearing, the State Engineer respectfully requests an
3 expeditious ruling on this issue in order to move forward with the hearing.

4 DATED this 11th day of September, 2012.

5
6 CATHERINE CORTEZ MASTO
Attorney General

7
8 By: /s/ Bryan L. Stockton
9 BRYAN L. STOCKTON
Senior Deputy Attorney General

10 *Attorneys for Nevada State Engineer*
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Office of the Attorney General
100 N. Carson Street
Carson City, Nevada 89701

CERTIFICATE OF SERVICE

1 I hereby certify that I am an employee of the Office of the Attorney General of the
2 State of Nevada and that on this 11th day of September, 2012, I electronically filed the
3 foregoing **STATE ENGINEER'S PETITION FOR INSTRUCTION** with the Clerk of the
4 Court using the CM/ECF system, which will send notification to parties on the service
5 list:

6 Sent via U.S. Mail to the following:

7
8 Stephen B. Rye, Esq.
9 215 W. Bridge St., Ste. 3
10 Yerington, Nevada 89447

11 Linda Bowman, Esq.
12 P.O. Box 10306
13 Reno, Nevada 89510-0306

14 Jim Snyder
15 P.O. Box 550
16 Yerington, Nevada 89447

17 Campbell Canal Co.
18 c/o Rife and Associates
19 David Sceirine, President
20 22 Hwy 208
21 Yerington, Nevada 89447

22 Newhall Mutual Ditch Co.
23 Darrell E. Pursel, President
24 42 McKenzie Lane
25 Yerington, Nevada 89447

26 David Sceirine
27 P.O. Box 239
28 Yerington, Nevada 89447

Joseph Sceirine
P.O. Box 1013
Yerington, Nevada 89447

/s/ Sandra L. Geyer
Sandra L. Geyer
Legal Secretary II
Office of the Attorney General

Office of the Attorney General
100 N. Carson Street
Carson City, Nevada 89701